

Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 47 | Issue 4

Article 6

Spring 1972

Public Interest Right to Participate in Federal Administrative Agency Proceedings: Scope and Effect

Wray C. Hiser

Indiana University School of Law

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>



Part of the [Administrative Law Commons](#)

Recommended Citation

Hiser, Wray C. (1972) "Public Interest Right to Participate in Federal Administrative Agency Proceedings: Scope and Effect," *Indiana Law Journal*: Vol. 47: Iss. 4, Article 6.

Available at: <http://www.repository.law.indiana.edu/ilj/vol47/iss4/6>

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

NOTES

PUBLIC INTEREST RIGHT TO PARTICIPATE IN FEDERAL ADMINISTRATIVE AGENCY PROCEEDINGS: SCOPE AND EFFECT

Growing public awareness and concern over the environment have resulted in individuals and organized public interest groups seeking to intervene in administrative agency proceedings in order to participate and influence agency actions. As a consequence, such decisions as the licensing and placement of dams, power plants, high voltage lines and natural gas pipelines are no longer left to the sole determination of government and industry. The right to intervene, therefore, has become an important issue, as petitions to intervene have become more frequent.

This note will review the development of the "public interest" right to intervene in administrative hearings and the role of such participation in the administrative process. While the benefits of intervention include improved governmental responsiveness to public demands, these benefits must be weighed against the consequences of administrative delay, greater taxpayer costs and possible overburdening of the administrative process. The goal, then, is the reconciliation of public participation with the need for efficiency and economy.

DEVELOPMENT OF THE RIGHT TO INTERVENE

When Congress created the various regulatory agencies it often provided for participation in trial-type proceedings by "parties in interest" or persons whose participation in those proceedings might be in the "public interest."¹ The Administrative Procedure Act² incorporated this broad guideline for participation:

1. For example, the Natural Gas Act provides that:

The FPC may admit as a party . . . any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

15 U.S.C. § 717n(a) (1970). An identical provision appears in the Federal Power Act, 16 U.S.C. § 825g(a) (1970). See also Federal Trade Commission Act, 15 U.S.C. § 45b (1970); Public Utility Holding Company Act of 1935, 15 U.S.C. § 79s (1970); National Labor Relations Act, 29 U.S.C. § 160(b) (1970); Atomic Energy Act of 1954, 42 U.S.C. § 2239 (1970); Federal Communications Act, 47 U.S.C. § 309(e) (1970); Interstate Commerce Act, 49 U.S.C. § 42 (1970); Federal Aviation Act of 1958, 49 U.S.C. § 1489 (1970).

2. 5 U.S.C. § 551 *et seq.* (1970).

. . . So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. . . .³

Some agencies, under congressional authority to prescribe their own procedural rules and regulations, have also included the "public interest" as one standard for intervention.⁴

Few cases have arisen to permit judicial interpretation of this standard because of the small number of parties seeking to intervene in the public interest. However, in those few cases dealing with the problem, the courts have tended to confuse public intervention with standing to seek judicial review of final agency orders.⁵ In *FCC v.*

3. 5 U.S.C. § 555(b) (1970). This provision of the Act applies to any agency proceeding, whether adjudicative or rule making, formal or informal. The Act provides that in rule making:

[T]he agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. . . .

5 U.S.C. § 553(c) (1970).

In adjudication:

The agency shall give all interested parties opportunity for— . . . the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceedings, and the public interest permit. . . .

5 U.S.C. § 554(c) (1970).

Thus the standards for intervention in rule making or adjudication are essentially the same.

4. For example, the FPC Rules of Practice and Procedure provide:

A petition to intervene may be filed by any person claiming a right to intervene or an interest of such nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought. Such right or interest may be: . . .

. . . .

(3) Any other interest of such nature that petitioner's participation may be in the public interest.

18 C.F.R. § 1.8(2)(b) (1972). *See also* AEC, Rules of Practice, 10 C.F.R. § 2.714 (1972); CAB, Rules of Practice in Economic Proceedings, 14 C.F.R. § 302.15 (1971); FTC, General Procedures, 16 C.F.R. §§ 1.16(c), 3.14 (1971); SEC, Rules of Practice, 17 C.F.R. 201.9(e) (1971); NLRB, Rules and Regulations, 29 C.F.R. § 102.29 (1971); FCC, General Rules of Practice and Procedure, 47 C.F.R. § 1.223 (1971); ICC, Practice and Procedure, 49 C.F.R. § 1100.72 (1971). The Army Corps of Engineers Administrative Procedure, 33 C.F.R. § 209.120(g) (1971), provides that "public hearings are helpful and will be held whenever there appears to be sufficient public interest to justify such action."

5. Standing to seek review of an administrative order is based on entirely different standards than standing to intervene. Instead of simply being an "interested person" or a representative of the "public interest" as under the intervention statutes, a prospective petitioner for judicial review must establish that he has been "aggrieved" or "adversely

National Broadcasting Co.,⁶ radio station WHDH in Boston applied to the Federal Communications Commission to increase power and to broadcast at night. KOA, a Denver clear-channel radio station already licensed on the same frequency of 850 kilocycles 24 hours daily, petitioned to intervene on the basis of Commission rules which precluded licensing two stations to operate on a clear channel at night. The Commission denied intervention.⁷ The FCC then amended its rules by removing the 850 kilocycle frequency from the list of clear channels and approved WHDH's application.⁸ On review, the court of appeals reversed the Commission's order.⁹ The FCC thereupon appealed to the Supreme Court, contending that KOA had no standing to seek judicial review. The Court determined that under § 312(b) of the Federal Communications Act¹⁰ KOA was entitled to become a party to the FCC proceeding which, in effect, threatened an amendment of its license. The Court concluded that, as a result, KOA had standing to challenge the FCC order:

In view of the fact that § 312(b) grants KOA the right to become a party to the proceedings, we think it plain that it is a party aggrieved, or a party whose interests will be adversely affected. . . .¹¹

Shortly after this decision, the Federal Power Commission, in an attempt to limit the effects of the ruling, began to admit interveners under specified conditions. In *Interstate Electric, Inc. v. FPC*,¹² Interstate had petitioned to intervene in order to oppose the merger of two competitor electric companies. The FPC granted limited intervention, stating that the permission "shall not be construed as recognition by

affected" by the agency order, or that he is suffering a legal wrong. Administrative Procedure Act § 10, 5 U.S.C. § 702 (1970). See also Public Utility Holding Company Act of 1935, 15 U.S.C. § 79x(a) (1970); Federal Power Act, 16 U.S.C. § 825(1)(b) (1970); Atomic Energy Act of 1954, 42 U.S.C. § 2239(b) (1970); Federal Communications Act, 47 U.S.C. § 402(b) (1970).

6. 319 U.S. 239 (1943).

7. 8 F.C.C. 397, 413 (1940).

8. 8 F.C.C. at 400.

9. 132 F.2d 545 (D.C. Cir. 1942).

10. Any station license . . . may be modified by the Commission . . . if in the judgment of the Commission such action will promote the public interest, convenience, and necessity. . . . No such order of modification shall become final until the holder of the license . . . shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity . . . to show cause by public hearings, if requested, why such order of modification should not issue.

47 U.S.C. § 316(a) (1970).

11. 319 U.S. at 247.

12. 164 F.2d 485 (9th Cir. 1947).

the Commission that [Interstate] might be aggrieved by any order or orders of the Commission entered in this proceeding."¹³ After the FPC authorized the merger, Interstate sought review, claiming a right to challenge the order. The court of appeals dismissed, stating that Interstate had submitted no evidence that it was an aggrieved party. The court relied on the FPC's reservation, implying that without this restriction Interstate would have had standing to seek judicial review.

The converse of the theory that intervention implies a right of standing to seek judicial review was first expressed in *National Coal Association v. FPC*.¹⁴ The East Tennessee Natural Gas Company applied to the FPC for authorization of a pipeline to supply the Atomic Energy Commission at Oak Ridge, Tennessee. The National Coal Association, the United Mineworkers and the Railway Labor Association were allowed to intervene to protest the pipeline. The FPC approved the pipeline, and the intervenors sought review. In contesting the petitioners' standing to seek review, the FPC argued that since it had granted intervention in its discretion, the petitioners had no "right" of intervention and, therefore, no right to seek judicial review. The court of appeals first found that petitioners were competitors threatened with financial loss and, therefore, were "aggrieved persons" entitled to judicial review. Then, in reply to the FPC's argument that petitioners had no "right" to intervene, the court said, "We think it clear that any person who would be 'aggrieved' by the Commission's order, such as a competitor, is also a person who has a right to intervene."¹⁵ This logic was directly reaffirmed in *Elm City Broadcasting Corp. v. United States*,¹⁶ where the Court of Appeals for the District of Columbia Circuit held that the FCC has no discretion to deny intervention to a person who would have standing to challenge the final order.

The following year the same court developed the obverse of this theory, that if there is no right to judicial review, there is no right to intervene.¹⁷ In *Memphis Light, Gas and Water Division v. FPC*,¹⁸ the

13. *Id.* at 485.

14. 191 F.2d 462 (D.C. Cir. 1951).

15. *Id.* at 467.

16. 235 F.2d 811 (D.C. Cir. 1956). *See also* American Communication Ass'n v. United States, 298 F.2d 648 (D.C. Cir. 1962); Virginia Petroleum Jobbers Ass'n v. FPC, 265 F.2d 364 (D.C. Cir. 1959); Philco Corp. v. FCC, 257 F.2d 656 (D.C. Cir. 1958); Metropolitan Television Co. v. United States, 221 F.2d 879 (D.C. Cir. 1955); Camden Radio v. FCC, 220 F.2d 191 (D.C. Cir. 1954). *But see* Lynchburg Gas Co. v. FPC, 284 F.2d 756 (3d Cir. 1960).

17. *But see* Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353 (1955):

[M]ay one who has no standing to obtain review become a party to the administrative proceeding? The answer is that the rules governing intervention are

FPC denied two petitions for intervention in a natural gas purchase certification. The companies sought review, contending abuse of discretion by the FPC. The court found that since neither was an "aggrieved person," neither had the right to intervene and dismissed the action for lack of standing.

By this time the courts had so intermingled intervention and standing to seek judicial review that the doctrines had little, if any, individual significance. Thus, in *National Welfare Rights Organization v. Finch*,¹⁹ the D.C. court again equated intervention with standing to seek judicial review. The Department of Health, Education and Welfare had announced hearings to determine whether the welfare laws of Nevada and Connecticut failed to conform to federal standards. The plaintiff, an association of welfare recipients, requested permission to intervene and participate in the hearings; the request was rejected. The association's petition for judicial review resulted in reversal of the HEW order:

Cases concerning the question of standing before one or the other tribunal have been used interchangeably in resolving questions of standing to intervene. Except for the adjustments necessary for assuring the manageability of administrative proceedings, the criteria for standing for review of agency action appear to assimilate the criteria for standing to intervene.²⁰

To support the decision, the court relied on Professor Davis's statement that the right to intervene in administrative proceedings is closely related to the elaborate body of law concerning standing.²¹ The court, however, failed to consider his next statement: "But intervention and standing to challenge are not the same and are not governed by the same consi-

quite different from the rules governing standing to obtain review.

Id. at 382.

18. 243 F.2d 628 (D.C. Cir. 1957).

19. 429 F.2d 725 (D.C. Cir. 1970).

20. *Id.* at 732-33. Professor Davis concluded: "The cases indicate no appreciable difference between one who has an 'interest,' one who is 'adversely affected,' and one who is 'aggrieved.'" 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 216 (1958) [hereinafter cited as DAVIS]. See also *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1000 n.8 (D.C. Cir. 1966).

In 1971 HEW issued Rules of Practice and Procedure for state conformity hearings which included similar guidelines for public participation:

Other individuals or groups may be recognized as parties, if the issues to be considered at the hearing have caused them injury and their interest is within the zone of interests to be protected by the governing Federal statute.

36 Fed. Reg. 1454-55 (1971).

21. 1 DAVIS, *supra* note 20, § 8.11, at 564 (1958).

derations."²² Professor Davis sets out some of these considerations and policies distinguishing intervention from standing to challenge:

The central problem of intervention is usually the disadvantage to the tribunal and to other parties of extended cross-examination; judicial review involves no such problem. Adequate protection for interests obliquely affected may often be afforded through limited participation; no such compromise concerning judicial review is customary. No constitutional restrictions affect intervention; standing to obtain review is substantially affected by the constitutional requirement of case or controversy. Intervention means mere participation in a proceeding already initiated by others; obtaining judicial review normally means instituting an entirely new judicial proceeding.²³

While the courts continued to confuse these two concepts, the commentators began to stress the need for distinguishing intervention from judicial review, but for conflicting reasons. Professor Shapiro cites the need for differentiating between these concepts to remove the limitations on intervention and to encourage more public participation in agency proceedings.²⁴ In contrast, Professor Jaffe argues for a separation of the concepts in order to restrict unlimited intervention resulting in considerable delays and inefficiencies.²⁵

22. *Id.* One practical reason for granting intervention to any person who would be adversely affected is to allow him to build a record for review. "The right to appeal from an order presupposes participation in the proceedings which led to it." *Virginia Petroleum Jobbers Ass'n v. FPC*, 265 F.2d 364, 368 (D.C. Cir. 1959). Professor Jaffe disagrees:

Does standing to appeal necessarily imply a right to an administrative hearing? It will be said that a right to appeal to be "effective" implies a right to make or participate in making the administrative record. No doubt a right to participate at the administrative level increases the effective scope of the right to appeal, but the right to attack an order resting on a record made by others, or on no record at all, could be valuable. *It would have precisely the virtue, if that virtue were being sought, of expanding the class of potential public champions to attack "obviously" invalid orders without a similar expansion of the administrative process.*

L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 524-25 (1965) (emphasis in original) [hereinafter cited as JAFFE].

23. 3 DAVIS, *supra* note 20, § 22.08, at 241 (1958).

24. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 HARV. L. REV. 721, 728 (1968) [hereinafter cited as Shapiro].

25. JAFFE, *supra* note 22, at 525 (1965). In a case relaxing standing requirements, the Supreme Court has said, "Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 154 (1970).

These two commentators express the contrasting policies concerning intervention. One policy proposes more liberal rules for intervention and broader judicial interpretation of the existing rules and regulations. The basis for this view is the belief that more intervention means more public participation, resulting in more responsive government regulation. The opposite argument is that more intervention will engulf the already overburdened agencies, resulting in more delays, less responsiveness, greater costs and possibly a breakdown of the entire administrative system.

THE NEED FOR PUBLIC PARTICIPATION

The proponents of liberalized intervention contend that a public right to intervene is needed because the agencies have been unable or unwilling to safeguard the public interest on their own.²⁶ It is also argued that greater public participation will induce agency action more favorable to the general public.²⁷

Still another reason offered is that public participation in rule making may be of particular aid when the final rule is an unpopular one, for the losers before the agency will less likely sabotage a rule if they have had an adequate opportunity to present their objections first.²⁸ While this theory may have some validity in small group contexts, there is reason to doubt its application to the macroadministrative process. First, even unlimited public interest group participation would allow only a small number of dissenters to personally present their objections to the rulemaking authority. While elected spokesmen or hired attorneys may present the common objections shared by the majority of the membership, it is unlikely that this vicarious dissent would be sufficient to pacify violent objections. Indeed, it is not clear that the mere presentation of objections before an agency constitutes sufficient "participation" in rulemaking so as to reconcile the protestors to the final agency decision. Thus, while there may be some cathartic benefit in public participation, it is likely to be very minor.

26. Keller, *The Law of Administrative Standing and the Public Right of Intervention*, 21 FED. COM. B.J. 134 (1967).

27. Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540 (1970). Bonfield also argues that public participation is desirable because it "helps to elicit 'the information, facts and probabilities which are necessary to fair and intelligent action' by those responsible for promulgating administrative rules." *Id.* at 540.

28. *Id.* at 541. Occasionally this theory has been oversimplified to the point that an administrative agency is perceived simply as a scale, responding favorably to the party with the greatest volume of evidence. The result is that the agency is deluged with an overabundance of witnesses and exhibits, creating excessive delay.

Implicit in many of the arguments for greater public participation is the theory that the regulatory commissions have been "captured" by the very industries which they were created to regulate.²⁹ Even one commissioner of the FCC, Nicholas Johnson, has noted the reluctance of the agencies to consider the public interest when it conflicts with industry objectives. Commissioner Johnson states: "For those who attempt to challenge the subgovernment, there is little toleration. There is an iron fist reaction every time the public shows even the most pathetic willingness to do battle."³⁰

Professor Sax is another who criticizes the administrative process for failing to protect the public interest:

[T]he administrative process tends to produce not the voice of the people, but the voice of the bureaucrat—the administrative perspective posing as the public interest. Simply put, the fact is that the citizen does not need a bureaucratic middleman to identify, prosecute, and vindicate his interest in environmental quality. He is perfectly capable of fighting his own battles—if only he is given the tools with which to do the job.³¹

The means which Professor Sax envisions, however, extend beyond broader participation in agency proceedings. He recommends that in light of administrative inflexibility environmentalists, consumers and public interest advocates should turn to the courts for relief.³²

29. W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* 867 (1970). *Accord*, 116 CONG. REC. 10246 (1970) (remarks of Senator Proxmire, D. Wis.). *See also* Huntington, *The Marasmus of the ICC: The Commission, the Railroads and the Public Interest*, 61 YALE L.J. 467 (1952).

30. Johnson, *A New Fidelity to the Regulatory Ideal*, 59 GEO. L.J. 869, 884 (1970) [hereinafter cited as Johnson]. Commissioner Mary Gardner Jones of the FTC is less emphatic but offers more insight into why the agencies are not overly responsive to the demands of public interest groups:

Too much attention has been paid in the past to insulating agencies from excessive or improper pressure by special-interest groups or political interests or to concerns with ensuring that administrative agencies act at all times expeditiously and fairly. While these are important concerns, they tend to obscure the basic problem of providing incentives whereby administrative agencies will perceive and react with imagination and sensitivity to the ever-changing needs and new conditions constantly emerging in society.

Jones, *The Role of Administrative Agencies as Instruments of Social Reform*, 19 AD. L. REV. 279, 300 (1967).

31. J. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* 56 (1971).

32. "Our need is not for more or fancier procedures before the same old agencies—it is for a shift in the center of gravity of decision-making." *Id.* at 61.

THE PUBLIC INTEREST AND THE RIGHT TO INTERVENE

In response to the arguments for broader public participation in administrative proceedings, the courts have taken an affirmative approach. In *Office of Communication of United Church of Christ v. FCC*,³³ the D.C. court granted a representative of the licensing public the right to intervene in a license renewal proceeding. The basis of the decision granting intervention was not the earlier confusion, equating intervention with the right to obtain judicial review. Instead, the court relied on the Commission's mandate to act in the public interest. According to the court, "[i]n order to safeguard the public interest in broadcasting, . . . some 'audience participation' must be allowed in license renewal proceedings."³⁴ This case has provided a precedent for other individuals and public interest groups to obtain admission to various administrative proceedings.³⁵ Presumably, in some cases the agencies have simply granted intervention rather than attempt to defend denials before unfavorable courts. In the few cases in which an agency has denied intervention, the denial has generally been reversed on review.³⁶

In *Palisades Citizens Association, Inc. v. CAB*,³⁷ the court directly recognized a "public interest" right to intervene. The CAB was investigating a request for helicopter service between Baltimore, Maryland, and Washington, D.C. The plaintiff, an association of property owners, sought to intervene to protest the service in order to reduce "noise, air pollution and safety hazards." The court held that these environmental questions were proper "public interest" issues to be presented to the Board and considered by it.

Further, in *Environmental Defense Fund, Inc. v. Hardin*,³⁸ several environmentalist organizations petitioned the Secretary of Agriculture to suspend the registration of products containing DDT for sale in

33. 359 F.2d 994 (D.C. Cir. 1966).

34. *Id.* at 1005.

35. See, e.g., *Citizens Comm. v. FCC*, 436 F.2d 263 (D.C. Cir. 1970); *National Welfare Rights Organization v. Finch*, 429 F.2d 725 (D.C. Cir. 1970); *Cities of Statesville v. AEC*, 441 F.2d 962 (D.C. Cir. 1969); *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125 (D.C. Cir. 1969); *Jaurez Gas Co. v. FPC*, 375 F.2d 595 (D.C. Cir. 1967); *Powleton Civic Home Owners Ass'n v. Department of HUD*, 284 F. Supp. 809 (E.D. Pa. 1968).

36. See, e.g., *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970); *Marine Space Enclosures v. FMC*, 420 F.2d 577 (D.C. Cir. 1969); *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). See also Hanes, *Citizen Participation and Its Impact Upon Prompt and Responsible Administrative Action*, 24 Sw. L.J. 731, 741 (1970): "Over-reaction on the part of agencies to obviate reversal may add considerable delay." See also Shapiro, *supra* note 24, at 744.

37. 420 F.2d 188 (D.C. Cir. 1969).

38. 428 F.2d 1093 (D.C. Cir. 1970).

interstate commerce. When the Secretary took no action, the petitioners filed suit to enforce compliance. The Secretary moved to dismiss on the basis that petitioners lacked standing. Again, the court held for the petitioners, stating that "[c]onsumers of regulated products and services have standing to protect the public interest in the proper administration of a regulatory system enacted for their benefit."³⁹

Similarly, in *Moss v. CAB*,⁴⁰ the court voided an increase in domestic air fares arrived at in private meetings between the Board and representatives of the airline industry as a violation of the Federal Aviation Act.⁴¹ The court said, "Congress requires public participation in making rates because it is the public who pays them."⁴²

The "public participation" doctrine has also arisen in the environmental law context. In *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*,⁴³ petitioners alleged that certain rules adopted by the Atomic Energy Commission failed to satisfy the requirements of the National Environmental Policy Act of 1969⁴⁴ (NEPA). The AEC rules in question⁴⁵ provided that environmental factors need not be considered by the hearing board unless affirmatively raised by some party to the hearing and that the hearing board was prohibited from independently evaluating environmental factors if other agencies had already certified those factors by their own standards. The court, holding that these rules failed to meet NEPA requirements, characterized the effect NEPA has on administrative agencies: "NEPA . . . makes environmental protection a part of the mandate of every federal agency and department."⁴⁶ If every agency is thus required to consider environmental factors fully, public interest groups have expanded authority upon which to claim a right to intervene and participate in the administrative process.

The development of a "public interest" right to participate in agency proceedings involves several important considerations. First, the proponents of broader public participation have justified their demands for more access by asserting that the commissions have become industry-oriented. It has been so often repeated that the regulated control the regulators that the notion has achieved wide acceptance.⁴⁷ The fact that

39. *Id.* at 1097.

40. 430 F.2d 891 (D.C. Cir. 1970).

41. Federal Aviation Act § 1002(d), 49 U.S.C. § 1482(d) (1970), requires a public hearing before the Board may change an existing rate.

42. 430 F.2d at 902.

43. 449 F.2d 1109 (D.C. Cir. 1971).

44. 42 U.S.C. § 4321 *et seq.* (1970).

45. 10 C.F.R. § 50, App. D (1971).

46. 449 F.2d at 1112.

47. The commissions are surrounded daily by industry representatives and experts,

the courts have recognized a public interest right to intervene indicates that they have not fully accepted the "capture" theory.⁴⁸ Instead, the courts seem to recognize that the agencies have been isolated.⁴⁹

The independence of the commissions from the executive branch makes them extremely susceptible to industry pressure exerted through Congress.⁵⁰ But, at the same time, these commissions are susceptible to counter-pressure by consumers, environmentalists or advocates of the public interest. The regulatory commissions are sensitive political bodies, quick to adjust to any major change in the power structure:

while consumers or the public are seldom represented. The continuation of commission regulation depends upon the acceptance of the regulated industry; thus, the commission begins to compromise with the industry.

Commissions operate in hostile environments, and their regulatory policies become conditional upon the acceptance of regulation by the regulated groups. In the long run, a commission is forced to come to terms with the regulated groups as a condition of its survival.

Bernstein, *The Commissions Have Failed*, in *THE INDEPENDENT FEDERAL REGULATORY AGENCIES* 61 (L. Salomon ed. 1959).

A regulatory commission's view of the public welfare is inevitably limited to its own sphere of experience. . . . As long as each agency administers its regulations without regard for the programs of other agencies, the welfare of the regulated industry becomes a standard of reference for determining the public interest.

M. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 161 (1955).

Also of importance is the fact that commissioners, their staff and representatives of the regulated industry share similar backgrounds, have primarily the same interests and are in constant day-to-day association.

I once suggested to Professor Jaffe of the Harvard Law School that a good subject for a paper in his seminar would be "The Influence of the Car Pool on Administrative Law"; perhaps we should add the cocktail party and the Saturday night poker game.

Friendly, *A Look at the Federal Administrative Agencies*, 60 COLUM. L. REV. 429, 438 (1960). See also L. KOHLMEIER, *THE REGULATORS* 69-82 (1969).

48. Shapiro, *supra* note 24, at 765.

49. The cardinal fact that underlies the demand for broadened public participation is that governmental agencies rarely respond to interests that are not represented in their proceedings.

The Why, Where, and How of Broadened Public Participation in the Administrative Process 5 (Address by Prof. Cramton to the Administrative Process Symposium, Georgetown Univ. Law Center, Sept. 17, 1971) [hereinafter cited as Cramton].

50. Regulatory commissions are distinct from executive agencies in that they are "independent" of the executive, i.e. they are not under the direct control of the executive office, the staff and upper echelon officials are not appointed by the President and their budgets are not reviewed by the Bureau of the Budget. As a result, the President and top-ranking executive officers are not inclined to intervene on behalf of these commissions against congressional pressure. See Harris, *The Senatorial Rejection of Leland Olds: A Case Study*, 45 AM. POL. SCI. REV. 674 (1951). In 1930, Congress "reorganized" the Federal Tariff Commission by ending the terms of all the commissioners in office, resulting in a complete turnover of personnel at one time. The commissions are also subject to congressional control of the purse strings. See R. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 449-50 (1941).

We are not entitled at this point to assume that because in the past agencies have had little regard to environmental protection they will continue in that way in the future. The political situation has radically changed. There is now a large public demand which it would be suicidal for the agencies to ignore and which finds expression in important new legislation as well as in an aroused public opinion. To such pressures the agencies responded in the past, and there are no a priori reasons why they should not respond to such forces in the future.⁵¹

Thus, the fact of increased public interest intervention before the Commissions indicates a renunciation of despair over the administrative process and an important shift in the national power structure which may possibly be reflected by increased responsiveness of the commissions to public interest issues.

A second major consideration involved in public interest intervention is a determination of what constitutes the "public interest." While the courts have attempted to avoid any definition or interpretation, the problem has received increased attention among political scientists. One school of thought contends that the "public interest" is an absolute, perceivable quality. According to Professor Landis "public interest" is not a difficult phrase to interpret since this task merely requires reading the phrase in light of the general background, tenor and sweep of the statute.⁵² However, Professor Herring, after his study of the administrative system, discovered a major problem with such a public interest standard:

Although it is clear that the official must balance the interests of the conflicting groups before him, by what standards is he to weigh their demands? To hold out the *public interest* as a criterion is to offer an imponderable. Its value is psychological and does not extend beyond the significance that each civil servant must find in the phrase for himself. Acting in accordance with this subjective conception and bounded by

51. Jaffe, *The Federal Regulatory Agencies in Perspective: Administrative Limitations in a Political Setting*, 11 B.C. IND. & COM. L. REV. 565, 569 (1970). See also Jaffe, *The Administrative Agency and Environmental Control*, 20 BUFFALO L. REV. 231 (1971).

52. J. LANDIS, *THE ADMINISTRATIVE PROCESS* 66-67 (1938). Current commentators perceive the public interest as a "standard of goodness by which political acts can be judged" [Cassinelli, *The Public Interest in Political Ethics*, in *THE PUBLIC INTEREST*, NOMOS V 45 (C. Friedrich ed. 1962)] and as "the interests of freedom, equality, and opportunity—the widely held and unorganized interests." Sorauf, *Public Interest Reconsidered*, 19 J. POL. 616, 639 (1957).

his statutory competence, the bureaucrat selects from the special interest before him a combination to which he gives official sanction. Thus inescapably in practice the concept of public interest is given substance by its identification with the interests of certain groups.⁵³

Society is simply a complex of overlapping and intermingling groups. As such, no single or absolute public interest exists. The process of government, and thus administrative bodies, is not to rule in light of the absolute standard of the public interest, but rather to achieve a compromise—a harmony among the conflicting demands these groups present.⁵⁴

Consequently, if there is no abstract public interest, but rather only a compromise of conflicting group pressures, Professor Reich appears to be correct when he states that "the public interest is served by agency policies which harmonize as many as possible of the competing interests present in a given situation."⁵⁵ Thus, if the public interest is a balancing of all competing interests, does this mean that the administrative agencies must admit any intervenor who claims a public interest right to intervene? To reply that only "interested persons" should be permitted to intervene is to return to the very language of the Administrative Procedure Act.⁵⁶ How can one interest be denied participation when the public interest is a blend of all interests? Yet, how can the system operate with massive intervention by any and all groups that can convincingly present an issue?

53. E. HERRING, *PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST* 23-24 (1936) (emphasis in original). This same conclusion was reached thirty years earlier by Bentley:

[W]e shall never find a group interest of the society as a whole. . . . The society itself is nothing other than the complex of the groups that compose it.

A. BENTLEY, *THE PROCESS OF GOVERNMENT* 222 (1935).

54. [T]he myth of democracy demands that power be hidden behind symbols designed to transform might into right—a requirement excellently fulfilled by the use of a common good concept to disguise the fact that from the standpoint of particular policies there is no such thing as a common good. Moreover, this myth element performs a most constructive function in democratic government. Interest groups are thereby compelled to justify their appeals in terms of *all* the people, to include the entire public in phraseology designed only to help them achieve their own political successes. However niggardly they plan to be once the battle is over, they must offer to share the fruits of victory, thereby placing in their opponents' hands a powerful weapon if promises are not kept.

H. SMITH, *DEMOCRACY AND THE PUBLIC INTEREST* 29 (1960) (emphasis in original).

55. Reich, *The Law of the Planned Society*, 75 *YALE L.J.* 1227, 1234 (1966) [hereinafter cited as Reich].

56. 5 U.S.C. § 555(b) (1970).

THE CONSEQUENCES OF BROADENED INTERVENTION

With the development of a "public interest" right to intervene, participation in the administrative process began to increase. Critics contend that the courts have overburdened the agencies, forcing them to accept unlimited intervention and excessive delay. The consequences are forecast in dire terms by many critics.⁵⁷ Delay in the administrative process is as pervasive as it is in the judicial system. Hundreds of cases have pended for three years before the regulatory agencies, while delays of one or two years are routine. The backlog of cases is tremendous. Indeed, staffs are not even adequate to handle the new cases filed every year.⁵⁸

*Scenic Hudson Preservation Conference v. FPC*⁵⁹ is often cited by critics of broadened intervention. Consolidated Edison of New York filed an application with the FPC to build a pumped storage hydroelectric project on the Hudson River at Storm King Mountain. The Scenic Hudson Preservation Conference was allowed to intervene to object to the project and offer alternatives. The FPC approved Con Ed's application, and Scenic Hudson sought review. Initially, the court of appeals held that the "public interest" doctrine entitled petitioners to obtain judicial review.⁶⁰ The case was then remanded to the FPC for considera-

57. It is reasonable to anticipate that this unprecedented participation by individual citizens and groups on their behalf will tax the time, energy and ingenuity of the administrative agencies and result in major delays in the consummation of proceedings of great economic and social consequence.

Hanes, *Citizens Participation and Its Impact Upon Prompt and Responsible Administrative Action*, 24 Sw. L.J. 731, 738 (1970). Unchecked public participation may present additional problems.

A multi-party hearing which is allowed to proceed without restraint on the presentation of evidence, or without restriction on participation by counsel or individuals acting *pro se* can easily reach a dimension which makes the hearing process irrelevant to administration of the very statutes for which the proceeding exists.

Miller, *Ecology and the Administrative Process*, 23 Ad. L. Rev. 59, 63-64 (1970).

58. Ten years ago the FPC announced that it would take thirteen years with the staff it had at that time to clear up 2,313 producer rate cases pending as of July 1, 1960, and that with the contemplated 6,500 cases that would be filed during that thirteen-year period it could not become current until the year 2043, even if its staff were tripled. Since that time the FPC has succeeded in reducing its backlog by setting a natural gas rate for an entire area rather than through company-by-company determination. See R. LORCH, *DEMOCRATIC PROCESS AND ADMINISTRATIVE LAW* 49, 52-53 (1969) [hereinafter cited as LORCH].

59. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

60. In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of "aggrieved parties."

Id. at 616.

tion of the alternatives proposed by Scenic Hudson, the court stating that the FPC had failed in its statutory duty under the Federal Power Act⁶¹ to investigate any reasonable alternatives.⁶² In 1970, more than seven years after the initial application, the FPC again approved the Storm King project.⁶³ Scenic Hudson again sought judicial review, but this time the court of appeals affirmed the FPC decision.⁶⁴ The court cited the volume of the administrative record on remand. It involved 100 hearing days, the testimony of sixty expert witnesses and 675 exhibits. The record was more than 19,000 pages in length.⁶⁵

This case has engendered strong criticism. One commentator contends that the court's original decision "presents an open invitation to obstructionists to require repeated reopenings and delays of proceedings where delay may be the equivalent of defeat."⁶⁶ While there may be a great deal of validity in these charges, they suffer from a complete lack of supporting evidence and documentation. In order to reach any conclusion concerning a "public interest" right to intervene, more information about the frequency of intervention by public interest groups and the use of intervention by obstructionists is needed. Without this information,

61. All licenses issued . . . shall be on the following conditions: (a) That the project adopted . . . shall be such as in the judgment of the Commission will be best adopted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

16 U.S.C. § 803(a) (1970).

62. In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.

354 F.2d at 620. *See Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543, 547 (D.C. Cir. 1969).

63. 44 F.P.C. 350 (1970).

64. 453 F.2d 463 (2d Cir. 1971).

65. *Id.* at 469. The FPC found the costs of alternatives to the Storm King project amounted to an additional 137,000,000 dollars for gas turbines or 158,000,000 dollars for a nuclear-gas turbine combination. The FPC determined that these additional costs were not in the public interest. *Id.* at 471-72.

66. Seder, *Regulatory Activism—The Aftermath of Scenic Hudson*, 1969 ABA PUB. UTIL. L. SECTION 3.

Sometimes interveners pile into a case for the sole purpose of delaying a decision and making the proceeding too expensive for some competitors. Interveners impede the hearing and confuse the issues by long, complicated and often needless cross-examination and other presentations of evidence.

Lorch, *supra* note 57, at 51-52.

the most that can be said is that the courts have apparently failed to consider the consequences of "public interest" intervention.⁶⁷

LIMITATIONS ON THE "PUBLIC INTEREST" RIGHT TO INTERVENE

Suggestions have been offered to limit public interest participation and its delay. Primarily, the proposals concern some form of advisory hearing⁶⁸ or prehearing conference,⁶⁹ similar to the procedure followed in judicial proceedings. It is contended that in this manner the number of issues and questions in dispute can be reduced, frivolous claims dismissed and vast amounts of repetitive evidence and exhibits stipulated.

The Administrative Conference of the United States, in response to *Scenic Hudson*, has studied the problems of delay and its causes in the administrative system. The Conference's recommendation to Congress in 1969⁷⁰ proposed both prehearing conferences and the filing of evidence in written form. The system envisaged by the Conference entails the submission of all evidence with the pleadings. At the prehearing conference this bulk of evidence would be compiled and digested with stipulations for the uncontested data and limitations on the disputed issues. As a result, the hearing would be limited to short statements of sponsorship of the exhibits and cross-examination would be limited to witness credibility and expertise.⁷¹ While no congressional action has been taken on these proposals, the FPC's Rules of Practice and Procedure had earlier incorporated similar provisions.⁷² These regulations may alleviate some of the problems of delay, but they do not fully solve the problem of restricting public interest participation.

The courts, the force most responsible for increased participation, have begun to address themselves to this problem. In *United Church*

67. Agencies confronted with increasingly crowded dockets and extensive delays have had difficulty persuading the courts either that there was in fact little a particular applicant for intervention could add to what the parties already in the case would present or that the opportunities for participation were adequate to protect the interest of the applicant even though they did not amount to full status as a party. Not enough attention has been paid, in other words, to the applicant's potential contribution or to the agency's need for expedition in the handling of cases.

Shapiro, *supra* note 24, at 765-66.

68. Reich, *supra* note 54, at 1265.

69. Long, *Administrative Proceedings: Their Time and Cost Can Be Cut Down*, 49 A.B.A.J. 833 (1963).

70. 115 CONG. REC. 36178 (1969).

71. M. RUHLEN, REPORT AND RECOMMENDATION OF THE COMMITTEE ON AUTHORIZATION AND LICENSES ON DELAYS IN FORMAL LICENSING PROCEEDINGS 3-10 (draft report of the Administrative Conference, 1969).

72. 18 C.F.R. §§ 1.18, 1.26 (1971). These rules were adopted by the FPC early in comparison with other federal agencies. Order 141, 12 Fed. Reg. 8477 (1947).

of *Christ*, The Court of Appeals for the District of Columbia Circuit responded to the FCC's argument that it would be inundated with intervenors by reaffirming the Commission's discretion to establish and apply regulations for restricting intervention:

including rules for determining which community representatives are to be allowed to participate and how many are reasonably required to give the Commission the assistance it needs in vindicating the public interest. The usefulness of any particular petitioner for intervention must be judged in relation to other petitioners and the nature of the claims it asserts as a basis for standing. Moreover, it is no novelty . . . to require consolidation of petitions and briefs to avoid multiplicity of parties and duplication of effort.⁷³

The courts have also approved other types of restrictions. In *Telephone Users Association, Inc. v. FCC*,⁷⁴ petitioner sought to intervene in an FCC investigation of telephone service rates. The FCC denied intervention, relying on its rule that requires all petitions for intervention to be submitted within thirty days after notice of hearing.⁷⁵ The court affirmed the denial as a reasonable restriction by the FCC.

The FPC's Rules of Practice and Procedure contain several restrictive provisions. Rather than a flat thirty-day limit for intervention, the FPC precludes intervention after the date fixed in the notice of any proceeding.⁷⁶ Only by a showing of extraordinary circumstances will the Commission authorize a late filing.⁷⁷ Participation by intervenors can be limited,⁷⁸ and a petition for intervention must set out clearly and concisely petitioner's alleged right or interest and specifically explain each contested fact or law with supporting authority.⁷⁹

73. 359 F.2d at 1006.

74. 375 F.2d 923 (D.C. Cir. 1967).

75. 47 C.F.R. § 1.223(b) (1971).

76. 18 C.F.R. § 1.8(d) (1971).

77. *Appalachian Power Co.*, 43 F.P.C. 494 (1970); *Northern Natural Gas Co.*, 42 F.P.C. 1274 (1969).

78. 18 C.F.R. § 1.8(f) (2) (1971). As a result it has become standard procedure for the FPC to grant a petition to intervene subject to the following proviso:

Provided, however, that the participation of such intervenor shall be limited to matters affecting asserted rights and interests as specifically set forth in the petition for leave to intervene; and *Provided, further*, that the admission of such intervenor shall not be construed recognition by the Commission that it might be aggrieved because of any order or orders of the Commission entered in this proceeding.

Appalachian Power Co., 43 F.P.C. 495 (1970).

79. 18 C.F.R. § 1.8(c) (1971).

In *Citizens for Allegan County, Inc. v. FPC*,⁸⁰ petitioner filed the necessary documents to intervene in a proposed electric company merger. The FPC granted intervention but simultaneously approved the merger. Petitioner sought judicial review, claiming intervention included a meaningful opportunity for participation. While the court affirmed the petitioner's right to intervene, it concluded that the evidence submitted in the petition developed the facts of the dispute to a sufficient degree to render further presentation unnecessary. The court suggested that a memorandum setting forth the intervenor's position on the issues was sufficient under the circumstances.⁸¹

The FPC's rules permit it to limit presentations or cross-examinations where two or more intervenors have substantially like interests or positions.⁸² In *Palisades Citizens*, the CAB, which has a provision similar to the FPC's,⁸³ denied a citizens' group intervention to protest authorization of a helicopter service. Since the Department of Transportation had already been granted formal intervention to present similar claims, the court held that the denial was not an abuse of the Board's discretion.⁸⁴ Finally, the courts have also recognized an agency's right to screen out frivolous claims or claims in which the petitioner does not have a valid, identifiable interest.⁸⁵

Thus, numerous techniques exist to restrict intervention validly without eliminating adequate consideration of the claims of all groups seeking to present significant interests.⁸⁶ If additional restrictions should become necessary, the administrative process is sufficiently flexible for further adjustments to be made.

80. 414 F.2d 1125 (D.C. Cir. 1969).

81. *Id.* at 1134.

[T]he right of opportunity for hearing does not require a procedure that will be empty sound and show, signifying nothing. The precedents establish, for example, that no evidentiary hearing is required where there is no dispute on the facts and the agency proceeding involves only a question of law.

Id. at 1128.

82. 18 C.F.R. § 1.8(g) (1971).

83. 14 C.F.R. § 302.15(b) (1971).

84. *See also* *Cities of Statesville v. AEC*, 441 F.2d 962 (D.C. Cir. 1969). Piedmont Cities Power Supply, Inc., representing eleven North Carolina cities, petitioned to intervene in a AEC licensing of nuclear reactors. The AEC denied intervention to Piedmont but admitted several of the cities. The court affirmed the AEC because the interests of the cities were already adequately represented.

85. *Martin-Trigona v. FCC*, 432 F.2d 682 (D.C. Cir. 1970); *Hale v. FCC*, 425 F.2d 556 (D.C. Cir. 1970).

86. One indirect and particularly undesirable technique for limiting public interest group participation involves the type of proceeding initiated:

[A]n agency's insistence on making decisions case-by-case on the basis of a lengthy evidentiary record may favor the regulated industry at the expense of upholders of the "public" interest because it throws the decision into the forum

THE ADMINISTRATIVE CONFERENCE PROPOSALS

Presently, few restrictions on public interest intervention are necessary since such activity has not reached significant levels.⁸⁷ Cost is the major reason underlying this sparseness of activity, as the courts have long recognized.⁸⁸ Public interest groups are often ad hoc, loosely organized associations which exist only for the purpose of meeting a common threat. Financing is often voluntary and meager, hardly sufficient to meet the immediate organizational costs.⁸⁹

in which the industry groups are best equipped to compete. It is not merely that trial-type hearings can be used to delay agency action—which is true—but they can also be used to obscure general principles in a mass of factual data, the compilation and presentation of which the industry is better prepared to accomplish than either public interest groups or agency staff. Therefore, one way of encouraging public participation in the agency process (viewing the process as a whole) is to focus that process more in the direction of deciding general principles by rulemaking.

Cramton, *supra* note 48, at 17-18. See also Shaprio, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965). But see Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970):

The very facet of rulemaking procedures which is applauded for permitting broad participation may serve as well to keep the depth of involvement and the treatment of specific, complex issues shallow. Participation in rulemaking procedures is not, of course, inevitably superficial; nor is it certain that adjudicatory procedures will produce analytical depth. It is not unreasonable though to expect that adjudication would provide opportunity for more meaningful involvement.

Id. at 516.

87. In responding to a 1966 congressional questionnaire about the causes of administrative delay, not a single member of the FPC or any of its hearing examiners referred to intervention as a cause or factor of delay. SUBCOMM. ON ADMINISTRATIVE PRACTICE & PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 89TH CONG., 2D SESS., QUESTIONNAIRE ON DELAY IN ADMINISTRATIVE PROCEEDINGS (Comm. Print 1966). The only comprehensive study of public participation in the administrative process was conducted by the Administrative Conference of the United States in late 1971. Based on preliminary staff reports, Chairman Roger C. Cramton reported that public participation is still extremely rare. In fact, the staff found no cases where public participation created any procedural problems. Cramton, *supra* note 48, at 5, 18. The final report of the study was compiled and written by Professor Gellhorn, who concluded that, "The number of public interventions in any one agency is, in most cases, still limited and the proceedings are unique." E. GELLHORN, PUBLIC PARTICIPATION IN ADMINISTRATIVE HEARINGS 4 (1971) [hereinafter cited as GELLHORN]. "The number of administrative trials in which public participants intervene as parties is still relatively few." *Id.* at 5.

88. Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1006 (D.C. Cir. 1966). See *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 617 (2d Cir. 1965).

89. Attorney fees alone can range from 30,000 to 40,000 dollars for an FDA proceeding and to over 100,000 dollars for a major FTC case. Cramton, *supra* note 48, at 23. If all evidence is submitted in written form and the hearing is drastically limited, attorney fees can be sharply reduced. Another major cost is transcripts. The agencies receive transcripts under contract from private reporting companies which also provide copies to the parties at higher costs. These public copies cost as much as three dollars

The Administrative Conference has presented several solutions for aiding public interest groups in meeting these costs.⁹⁰ In regard to transcript costs, it is contended that the parties should not be subsidizing the agency's copy as the system now operates.⁹¹ Instead, the agency should bear the full price of recording service as a proper cost of governmental regulation and each party should be charged only its own duplication costs. Further, some system may be arranged for an indigent party to have access to a transcript free of charge. The proposal seems wise in light of the overall purpose of public interest intervention. The cost would not be prohibitive on the agency, while the increased amount of intervention would not seriously hamper an agency's effectiveness.

Additionally, the Conference has suggested that the administrative agencies adopt rules to assist public interest intervenors in meeting attorney fees. The proposals are: (1) encouraging pro bono representation; (2) allowing attorney fee awards; (3) appointing agency personnel to represent interests; (4) funding the legal expenses of intervenors and (5) establishing an independent representational agency.⁹²

The encouraging of pro bono representation does not appear to be a significant change from the present. Much of the public interest legal work today is being done on a pro bono basis, and there does not seem to be much that an agency can do to encourage more. The pro bono attorney has an abundance of prospective clients, and this enables him to screen out frivolous or obstructive claims.

The other proposals, however, involve serious problems. The awarding of attorney fees could disrupt the entire administrative system. Administration of the program would be rendered extremely difficult, if not impossible, by the problems of determining who made a contribution and the amount to be paid. In addition the cost of such a program might be prohibitive. Such a program might also result in encouraging a class of attorneys who are more fee-conscious than mindful of their clients' interests. Finally, the proposal could easily result in the flood of intervenors which the critics have been predicting. While more public interest representation is desirable, the award of attorney fees could easily result in a mass of irresponsible intervenors. Since congressional approval seems doubtful for a system of money awards, it

per page in some agencies, and major cases involve thousands of pages. See GELLHORN, *supra* note 87, at 31 n.105.

90. COMM. ON AGENCY ORGANIZATION & PROCEDURE, ADMINISTRATIVE CONFERENCE OF THE U.S., RECOMMENDATION B: PUBLIC PARTICIPATION IN ADMINISTRATIVE HEARINGS (1971) [hereinafter cited as RECOMMENDATION B].

91. GELLHORN, *supra* note 87, at 32.

92. RECOMMENDATION B, *supra* note 90, at 5.

is unlikely the proposal will ever be implemented.

The third and fourth proposals for agency representation and legal services funding encounter the same difficulties. The quality of representation is uncertain since the attorneys would not be free from political pressure. The public interest group may not be willing to accept a staff attorney if it feels that the staff has already failed to protect the public. The costs of either program would be extremely high, and, once again, the demands of public interest intervenors could overtax the administrative agencies. Despite these drawbacks, serious consideration is being given these ideas. The FCC is currently studying a proposal to create an Office of Public Counsel to represent listener groups, while the FTC is investigating its authority to finance public intervenors.⁹³ The FPC, however, has already declined to finance intervenors.⁹⁴

The final proposal for an independent advocate agency is subject to many of the same criticisms. While an independent agency could develop a high degree of expertise and avoid the conflict of interest of agency counsel, it would be subject to greater political pressure and less likely to represent extreme or unorthodox views.⁹⁵ As the agency becomes more institutionalized, it will become its own client with its own interests to safeguard. As a result, most public interest groups would not be satisfied with this official representation. In many cases, further public interest intervention may even be precluded, as it was in *Palisades Citizens*, on the basis that formal intervention in the public interest by a governmental agency pre-empts the field. The policy of an administrative agency may become to deny intervention to all public interest groups while admitting the government advocate with its own peculiar self-interest. Despite these problems, the creation of a Consumer Protection Agency is imminent.⁹⁶ Although this new agency may become a valuable tool in representing the interests of unorganized consumers, it may deny the opportunity of participation to other organizations of a voluntary nature.

93. Cramton, *supra* note 49, at 32.

94. The FPC denied a request by People Organized to Win Effective Regulation (POWER) for 10,000 dollars in costs and fees. 35 Fed. Reg. 14001 (1970).

95. Johnson, *supra* note 30, at 893.

96. In the 91st Congress, the Senate passed by a 74-4 vote the Senate bill (S. 4459) to create such an agency with the right to intervene in any other agency proceedings. Further action was stalled, however, by the House Rules Committee. Similar legislation (H.R. 16) was introduced in the 92d Congress and passed by the House on Oct. 15, 1971, by a vote of 344-44. Senate confirmation is expected. Section 204 of the bill authorizes the Consumer Protection Agency to intervene as a matter of right in "any investigation, hearing, or other proceeding which does not solely involve an adjudication for the purpose of imposing a fine, penalty, or forfeiture" so long as the Agency finds that the "proceeding may substantially affect the interests of consumers."

SUMMARY

The regulation of industry by administrative bodies is primarily a process of balancing competing claims and demands by divergent groups and segments of society. In order to determine the "public interest" or the best compromise of these interests, the administrative body should be open and available to valid claims of responsible interests. The device of intervention is uniquely well-suited for this purpose so long as excessive delays or costs are not imposed on the administrative body. Judicial recognition of a "public interest" right to intervene is an important guarantee that each agency will be presented with the full range of interests, policies and considerations. While the costs of intervention have prevented effective participation by most public interest groups, these costs can be reduced by lower transcript charges and extremely limited attorney presentations. Other schemes of fee awards or agency representation are not in the best interests of the public interest groups and may result in a breakdown of the administrative process.

WRAY C. HISER